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**Tentative Ruling**

Re: ***Maldonado v. City of Fresno***  
Superior Court Case No.: 12CECG03742

Hearing Date: June 27, 2013 (**Dept. 402**)

Motion: Demurrer by Defendant City of Fresno to second amended complaint

**Tentative Ruling:**

To sustain, without leave to amend. The Court intends to deny Plaintiffs' request for judicial notice. (Evid. Code, §456.) The prevailing party is directed to submit directly to this Court, within 7 days of service of the minute order, a proposed judgment dismissing the action as to the demurring defendant.

**Explanation:**

Pleading Against Governmental Entities

To state a cause of action against a public entity under Government Code section 835, a plaintiff must plead: (1) a dangerous condition existed on the public property at the time of the injury; (2) the condition proximately caused the injury; (3) the condition created a reasonably foreseeable risk of the kind of injury sustained; and (4) the public entity had actual or constructive notice of the dangerous condition of the property in sufficient time to have taken measures to protect against it. Government Code section 830 defines a "[d]angerous condition" as "a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used." Property is not "dangerous" within the meaning of the statutory scheme if the property is safe when used with due care and the risk of harm is created only when foreseeable users fail to exercise due care. (*Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434, 439.)

The plaintiff must also plead facts sufficient to show that the cause of action lies outside the scope of any applicable statutory immunity. (*Keyes v. Santa Clara Valley Water District* (1982) 128 Cal.App.3d 882, 886.)

Except as otherwise provided by statute, a public entity is not liable for an injury, whether such injury arises out of an act or omission of a public entity or a public employee or any other person. (Gov. Code, § 815, subd. (a).)

### The "Sham-Pleading" Doctrine

"Under the sham-pleading doctrine, admissions in an original complaint that has been superseded by an amended pleading remain within the court's cognizance and the alteration of such statements by amendment designed to conceal fundamental vulnerabilities in a plaintiff's case will not be accepted." (*Lockton v. O'Rourke* (2010) 184 Cal.App.4th 1051, 1061.)

A plaintiff can avoid the effect of earlier admissions by including in a subsequent complaint a satisfactory explanation why earlier admissions are incorrect. Absent such explanation, however, self-destructive allegations in an earlier pleadings or discovery responses are "read into" the complaint, and allegations inconsistent therewith are treated as sham and disregarded. (*Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 384.)

### The Cause Of Action For Premises Liability

First, the first cause of action for "negligence" fails to state facts sufficient to constitute a cause of action because "[e]xcept as otherwise provided by statute, a public entity is not liable for an injury, whether such injury arises out of an act or omission of a public entity or a public employee or any other person." (Gov. Code, § 815, subd. (a); Code Civ. Proc., § 430.10, subd. (e).)

The second cause of action for dangerous of condition of public property fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).) The matters judicially noticeable and the allegations of the first amended complaint, which will be read into the second amended complaint, show on their face that it is barred by the immunity of Government Code section 831.4. The immunity is absolute. (*Prokop v. City of Los Angeles* (2007) 150 Cal.App.4th 1332, 1337.) There is no exception from application of the immunity for dual or mixed use purposes of the trail. (*Hartt v. County of Los Angeles* (2011) 197 Cal.App.4th 1391, 1400.) Nor does the fact that the surface of the trail is paved exempt it from the immunity. Full immunity is provided to any trail, paved or unpaved. (*Farnham v. City of Los Angeles* (1998) 68 Cal.App.4th 1097, 1103.)

That the "midblock crossing" is part of the Sugar Pine Trail is a conclusive concession of the truth of the matter and is removed from the issues. (4 Witkin, Cal. Proc. (5th ed. 2008) Pleading, § 454, p. 587.) Plaintiffs here have not offered a satisfactory explanation or indeed, any explanation, as to why this admission is incorrect. Absent such explanation, self-destructive allegations in an earlier pleadings or discovery responses are "read into" the complaint, and allegations inconsistent therewith are treated as sham and disregarded. (*Owens v. Kings Supermarket, supra*, 198 Cal.App.3d 379, 384.)

Plaintiffs attempt to distinguish that paved paths found to be trails in other cases could also be public streets or sidewalks fails. (*Amberger-Warren v. City of Piedmont* (2006) 143 Cal.App.4th 1074, 1078-1080 [A pathway in a dog park was a trail under recreational trail immunity statute under accepted definitions because it was a paved

pathway through a park, and a "path" is synonymous with a trail, it was designed and used for the recreational purpose of bringing a dog to an unleashed area of a dog park, and because public entities could well be inclined to close dog parks if they were exposed to liability for accidents occurring on them.]; *Carroll v. County of Los Angeles* (1997) 60 Cal.App.4th 606 [Immunity to "any trail" includes paved or unpaved trails that provide access to all types of vehicular riding, etc.].) In fact, these cases support Defendant City of Fresno's position, not Plaintiffs' position.

Nor is the second cause of action for dangerous condition of public property sufficiently specific as to how the property was dangerous. (*Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434, 436.) The allegations that "pedestrians . . . are invited to rely on the fact that once they are in a crosswalk, vehicular traffic will yield the right of way" and that "the Shepherd midblock crossing is not a crosswalk" and is "materially different than [sic] a crosswalk because pedestrians who enter the Shepherd midblock crossing do so at their own risk" and that "[d]rivers do not anticipate that pedestrians will be crossing in the middle of the street outside of a crosswalk in between two nearby controlled intersections" and that pedestrians "are encouraged to cross the busy street in an unsafe fashion by dashing out between obstructions into incoming traffic that is not anticipating pedestrians to be in the middle of the street and will not yield the right of way to pedestrians." It further alleges that Defendant City of Fresno "failed to perform any studies regarding the requirements for the location, use, and safety of a midblock crossing in this location before constructing" it and thus "failed to properly and safety design, engineer, and construct" it. There are allegations concerning increased traffic in ensuing years and "[a]s a result . . . failing to properly and safely design, engineer, maintain and manage" the crossing "including the surrounding area and lighting" which allegedly created a dangerous condition. These allegations are not specific enough as to how the property is dangerous.

Leave to amend is denied because Plaintiffs have not demonstrated how they can truthfully amend to overcome the immunity. "If there is no liability as a matter of law, leave to amend should not be granted." (*Schonfeldt v. State of California* (1998) 61 Cal.App.4th 1462, 1465.)

#### Denial Of Plaintiffs' Request For Judicial Notice

The fundamental rule of statutory construction is that the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. [Citations.] (*Walker v. Superior Court* (1988) 47 Cal.3d 112, 121.)

In construing a statute, courts look first to the plain language in order to ascertain the Legislature's intent. [Citations.] (*Township Homes, Inc. v. Superior Court* (1994) 22 Cal.App.4th 1587, 1591.) Where the language is clear, there can be no room for interpretation. (*Walker v. Superior Court* (1988) 47 Cal.3d 112, 121.)

The statutory language here is clear, not ambiguous, so there is no need for interpretation. The request to judicially notice the Enrolled Bill Report (August 24, 1970) from the Department of Parks and Recreation that is a part of the legislative history of

Senate Bill 291 from 190, the bill that amended Government Code section 831.4, will be denied.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

## Tentative Ruling

Issued By: JYH on 6/26/2013.  
(Judge's initials) (Date)